IN THE

Supreme Court of the United States

October Term 1968

No. 1016

L. M. THOMAS, JR.,

Petitioner,

vs.

THE STATE OF GEORGIA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE
COURT OF APPEALS OF GEORGIA

BRIEF FOR RESPONDENT IN OPPOSITION

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OPINIONS BELOW

The opinion and judgment of the Court of Appeals of Georgia and the denial of certiorari by the Supreme Court of Georgia without opinion, as yet unreported officially, is appended to the petition.

JURISDICTION

The jurisdiction of this court is conceded.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The citations by the Petitioner appears to cover the Constitutional Provisions and statutes involved in this case with the exception of the following Georgia Statutes:

(a) Georgia Code Annotated §27-304 (1933), which provided as of the dates involved in this case as follows:

> "All warrants shall state the time and date of issuance and be the warrants of the judicial officer issuing the same and not the warrants of the court in which he is then sitting and such warrants need not bear the seal of the court or clerk thereof. The complaint on which the warrant is issued need not be filed with the clerk of the court nor with the court if there is no clerk until the warrant has been executed or has been returned 'not executed': Provided, however, said judicial officer *shall keep a docket record* of all warrants issued by him and *upon issuing any warrant he shall immediately record same, within a reasonable time,* on said docket. (Acts 1966, pp. 567, 569)"

(b) Georgia Code Annotated §27-310 (1933), which provided as of the dates involved in this case as follows:

> "A written return of all instruments, articles or things seized shall be made without unnecessary delay before the judicial officer named in the warrant or before any court of competent jurisdiction. An inventory of any instruments, articles or things seized shall be filed with the return and signed under oath by the officer or person executing the warrant. The judicial officer or court shall upon

request deliver a copy of the inventory to the persons from whom or from whose premises the instruments, articles or things were taken and to the applicant for the warrant. (Acts 1966, pp. 567, 570)"

(c) Georgia Code Annotated §27-313 (1933), which provided as of the dates involved in this case as follows:

"(a) A defendant aggrieved by an unlawful search and seizure may move the court for the return of property the possession of which is not otherwise unlawful and to suppress as evidence anything so obtain on the grounds that:

(1) The search and seizure without a warrant was illegal; or

(2) The search and seizure with a warrant was illegal because the warrant is insufficient on its face; there was not probable cause for the issuance of the warrant; or, the warrant was illegally executed.

(b) The motion *shall be in writing* and state facts showing wherein the search and seizure were unlawful. The judge shall receive evidence out of the presence of the jury on any issue of fact necessary to determine the motion, and the burden of proving that the search and seizure were lawful shall be on the State. If the motion is granted the property shall be restored, unless otherwise subject to lawful detention, and it shall not be admissible in evidence against the movant in any trial.

(c) The motion shall be made only before a court with jurisdiction to try the offense. If a criminal accusation is filed, or if an indictment or special presentment is returned by a grand jury, the motion shall be made only before the court in which said accusation, indictment or special presentment is filed and pending. (Acts 1966, pp. 567, 571)"

QUESTIONS PRESENTED FOR REVIEW

Counsel for the State of Georgia, Respondent, cannot agree with Petitioner's brief (page 2) because as worded, the question ignores the actual decision on the issues by the State Court.

Being dissatisfied with the question as phrased by the Petitioner, we would restate it as follows pursuant to Rule 40 (3) of this Court:

1. Whether the Court below erred in ruling that it was within the Fulton County Trial Court's discretion to overrule a written Motion to Suppress Evidence that was not filed until all the State's witnesses had testified and after the State had rested its case.

2. Whether the Court below erred in ruling that the search of the petitioner's residence, where the petitioner had killed his wife, without a search warrant was reasonable under the exigencies of the emergency situation in the present case where the uncontradicted facts show:

> **The officers received an emergency call to the petitioner's residence stating that a person had been injured. A few minutes later, the officers received another call stating that the victim was being taken to Piedmont Hospital. However, the victim was dead when the officers arrived at the hospital.**
>
> **The officers proceeded directly from the hospital to answer the original call not knowing who had placed the original call to police or whether the call had been placed from the residence and not knowing whether someone else**

was injured or dead at the residence. The officers had been told by the son that an unknown number of persons had been called and were on their way to the residence. Moreover, the officers had been told by the petitioner and his son that the petitioner had hit the victim in the back of the head with a fruit jar during a violent argument and that the bedroom of the residence was covered with blood. The son asked the officers not to allow his brothers and sisters to see the bloody bedroom where his mother had been killed. The front door of the residence was open when officers arrived and no one responded to Officer Anglin's calls.

STATEMENT OF THE CASE

Counsel for the Petitioner has stated the facts and the chronology of the proceedings in this case in a manner that fails to reflect the true status of the issues currently before this court. His Statement of the Case ignored the true context of the Georgia Court of Appeal's decision by omitting material portions of the evidence relevant to the State Court's ruling which presents a distorted picture of the evidence and issues.

To comprehend the true issues in this petition for certiorari we feel it would benefit this court to have a more detailed summary of the evidence upon which the Georgia Court of Appeals rendered its decision.

A. CHRONOLOGY

The petitioner, L. M. Thomas, Jr., was arrested at Piedmont Hospital, Atlanta, Georgia on July 30, 1967 for suspicion of murder *in the death of his wife.* He

was indicted by the Grand Jury of Fulton County, Georgia on August 4, 1967 and charged with the offense of murder, the said offense having allegedly been committed at the family residence located in Fulton County, Georgia. *Some five months later* on January 8, 1968, L. M. Thomas, Jr. entered his plea of not guilty by joining issue, and the case proceeded to trial before a jury. (R 4-6) [1]

B. CHRONOLOGY OF THE TRIAL

The State presented its case to the jury in the following sequence of testimony, colloquy, and objections:

(a) This homicide took place on Sunday afternoon around 5:00 o'clock in Petitioner's home (R 20). There were no eyewitnesses. Petitioner's 19-year old son, L. M. Thomas, III, the State's first witness, a college student, was in the living room playing pool with a friend. His mother and father were in the bedroom. He heard his mother and father talking "fairly loud". (R 22-23). They were "almost shouting at each other" (R 23). About 5 seconds later, his mother called, "Sonny, come here", (R 23) his friend decided to leave, and the son entered his bedroom. He was shocked by what he saw. His mother (the victim) was in the adjoining bathroom, while his father (the Petitioner) was in the other bedroom "cursing" (R 22). His mother was holding a towel to her head, with blood saturating through (R 23). She told her son that she had been hit by a jar thrown at her by the Petitioner. The Petitioner said nothing (R 24). She was holding the towel to the back of her head (R 23). The son saw a broken glass jar in the bedroom and

[1]The pages listed are the approximate pages of the record. A copy of the record sent to this court was not made.

also a bent portion of a vacuum cleaner, Exhibit #1 (R 31-32). The son testified that his mother appeared intoxicated when he first saw her in the bedroom (R 44). Both Petitioner and his wife had been drinking alcoholic beverages that afternoon, prior to 5:00 o'clock according to the son (R 28). He saw blood on the floor of the bedroom (R 33). He identified States Exhibit No. 1 as looking like the vacuum cleaner handle in his father's and mother's bedroom (R 32).

(b) Dr. Margaret Summerville, the State's second witness, received a call from the answering service and reached Petitioner at 5:35 o'clock by phone at his home and asked him the nature of his wife's injury. He was "belligerent and hostile", (R 57) and would not give the doctor any information. "All he would say was she just had an accident, come and treat her" (R 57). She asked Appellant to describe the wound and he said "he could not stand the sight of blood" (R 58). The doctor told Petitioner to bring his wife to the office and she would meet him there in 20 minutes. She arrived at the office at 6:00 o'clock but Petitioner and the victim did not arrive until 6:30 (R 58). Mrs. Thomas was lying in the back seat, ashen colored and with a towel around the back of her head, which had a good deal of matted and dried blood. Petitioner said *"she can get up and walk if she wants to"* (R 59). However, she had to be carried into the office. Upon examination, the doctor saw a large hemotoma (behind the left ear) and a four inch cut from which tissue and blood was oozing. The victim's blood pressure was non-existent, heart tones very faint and irregular, pupils dilated, and no knee reflexes at all (R 60). She had a marked alcoholic odor to her breath and was able to speak but was "extremely

slurred and incoherent" (R 60). Bruises were visible upon her legs, pelvic area, and arms (R 82).

Mrs. Thomas said to Petitioner, in the doctor's presence, "I told you to leave me alone" (R 61).

The doctor gave the victim adrenalin, but there was no response in blood pressure whatever. Dr. Summerville then called a neuro-surgeon, called Piedmont Hospital and had Petitioner and his son drive the victim to the hospital. She followed in her car. They arrived at the hospital at 7:00 o'clock, gave Mrs. Thomas artificial respiration and extracardiac massage but in vain. She was pronounced dead at 7:25 p.m. The cause of death was head injury and shock (R 63-65).

Dr. Summerville gave her expert opinion that the broken glass jar (State's Exhibit 10), if thrown while empty at a person would probably not have caused a laceration and fracture of the magnitude of the wound behind the left ear of the victim (R 71). However, she stated that State's Exhibit One (the bent vacuum cleaner handle found in the bedroom) could possibly have caused such a wound (R 71-72).

(c) Paul Serene, a criminologist and microanalyst with the State Crime Laboratory, was the State's third witness. A considerable amount of expert testimony was introduced by the State which may be very briefly summarized. The bent vacuum cleaner handle, Exhibit #1, seized in the bedroom had traces of blood on the end (R 85). The top of the broken glass jar, (State's Exhibit #10) found in the bedroom had traces of blood and also some hair attached to it (R 85). Blood on towels, pillow, sheet and female clothing (State's Exhibits #11 and 12) found in the bedroom was Type A,

which is the same type as the blood sample taken from the deceased Mrs. Thomas (R 85-87). A hair taken from the head of Mrs. Thomas (State's Exhibit #13) was compared with hair from the broken glass jar (State's Exhibits #10 and 14) and "were identical in all respects" (R 87-89).

The defense thoroughly cross-examined this witness upon his findings (R 90-95).

(d) Detective C. A. Bailey, the State's fourth witness, went to the hospital to assist Detective Clements and left the hospital directly for the Thomas residence, where Mrs. Thomas had been killed a short time before, with Lt. Helms and Mr. Williams of the Identification Bureau. He identified State's exhibits #2, 3, 4, 5, 6, 7, 8 as photographs taken of the bloody bedroom and taken under his supervision and control. These exhibits were tendered into evidence (R 98-100).

At this time, defense counsel engaged in colloquy with the court requesting the opportunity to develop on cross-examination the police's authority to enter the home and take pictures (R 100-101). This was the first time any issue had been made to the legality of the search and was not in the form of a formal objection.

The direct examination of Detective Bailey continued without objection. He related the scene he discovered as follows:

> "In a bedroom in the home we found blood all over the floor of the bedroom, the bed in the bedroom that had blood on the sheets and pillow. Found a broken jar amidst all the blood and scattered clothing on the floor, numerous towels that were completely soaked with blood. Found bloody

> footprints leading from the bedroom into another bathroom and to another bedroom to a small hallway. In the bathroom, found some more bloody towels in a cardboard box, and also in the driveway found another bloody towel next to a Cadillac automobile. Found hair and a piece of flesh on the floor and found intact the neck of a broken bottle that had hair and small pieces of flesh on it also." (R 102)

Bailey identified State's exhibits No. 1, 10, 11, 12, and 14 and related where each exhibit was found in the bedroom without objection (R 102-106). Then he was cross-examined by the defense (R 106-109).

(e) After the direct and cross-examination of the State's fourth witness was completed, the defense made its initial oral motion to suppress State's exhibits No. 1, 2-8, 10, 11, 12, 13 and 14 upon the ground that these items were secured without a search warrant in violation of the defendant's rights under the Fourth Amendment as applicable to the States under the Fourteenth Amendment. However, *the objection or motion did not extend to striking the testimony of the various witnesses upon the exhibits* (R 109).

The defense failed to make any showing that the defense did not have an opportunity to file a motion to suppress evidence earlier. The defense *did not attempt to make any showing that the defense was not barred by laches* from filing a motion to suppress at this time. Moreover, the State pointed out that *the Defense had not been misled* and had not approached the State upon the matter of the search, which was not refuted (R 115).

The trial court overruled the oral motion to suppress the evidence and the subsequent motion to adjourn

until the defense could prepare and file a written motion to suppress (R 116). State's exhibits No. 2 through 8 were admitted into evidence over objection during subsequent testimony by the witness (R 117).

(f) The jury was sent to lunch while a brief five minute recess was taken for the benefit of the defendant (R 123).

After a brief *Jackson v. Denno* hearing, the court adjourned for the noon recess (R 128-129).

(g) Dr. Tom Dillon, the County Medical Examiner and the first witness after lunch, stated that the fatal wound was inflicted, in his opinion, by a blunt instrument, and that the broken glass jar *could not* have inflicted the fatal wound, but that the bent vacuum handle *could* have inflicted such wound (R 132).

(h) Atlanta Homicide Detective, E. A. Clements, went to the hospital on the night of the slaying, viewed the body of Mrs. Sara Thomas, discussed the case with Dr. Summerville, talked with Petitioner's son, and then to Petitioner, after advising him completely of his constitutional rights. Petitioner freely and voluntarily told the officers that "he and his wife were in the bedroom of their home, that he and his wife had had an argument about lying on the bed, that Mrs. Thomas began to curse him. She got up from the bed cursing him, that she went *toward the bathroom* at which time he *picked up a fruit jar sitting beside the bed, threw it at Mrs. Thomas,* striking her (R 125-126). He said "it hit her in the head" (R 127).

(i) R. J. Anglin, in whose police beat the Thomas home was located, received a police call to the Thomas'

residence on Old Roswell Road. Seconds later he received a call that the victim was at Piedmont Hospital. He proceeded to Piedmont Hospital where he found that the vicitm had died (R 154-156). He talked with L. M. Thomas, III (the son) who said he had a sister in college who had been notified and was on the way home. Also two brothers in South Georgia were on the way home. Officer Anglin testified the son said, "He wished I'd go back to the house and prevent them from seeing the room his mother had been in" (R 158).

Officer Anglin *proceeded to answer his original call* to the Thomas' home. Detective Bailey testified that Officer Anglin told him he was proceeding to the Thomas' residence because he didn't know whether someone else was injured at the home, who had called, or whether the call had been placed from the house (R 107).

Upon arrival, Officer Anglin found the front door open, knocked loudly, stepped inside, called out, and tried another door and found it locked. He then waited for the detectives and ID immediately behind him and the petitioner's children (R 158, 159).

(j) After the State rested its case, the defense filed a written motion to suppress the testimony of Detective E. A. Clements, C. A. Bailey, Paul Serene, and Dr. Tom Dillon relating to State's exhibits Nos. 1, 2, 3, 4, 5, 6, 7, 8, 10, 11, 12, and 14 and to suppress the exhibits enumerated for the first time. This written motion was filed at 2:25 P.M. in the afternoon of the second day of trial (R 160, 161).

REASONS FOR NOT GRANTING CERTIORARI

A. THE MOTION TO SUPPRESS EVIDENCE, THAT WAS NOT RAISED BY ORAL MOTION UNTIL AFTER FOUR STATE'S WITNESSES HAD ELABORATED UPON THE EVIDENCE AND WAS NOT FILED IN WRITTEN FORM UNTIL THE STATE RESTED, WAS PROPERLY DENIED IN THE PRESENT CASE WHERE NO SHOWING WAS MADE THAT THE DEFENSE DID NOT HAVE AN OPPORTUNITY TO KNOW WHETHER A SEARCH WARRANT HAD BEEN ISSUED PRIOR TO TRIAL.

The State Trial Court had the discretion to allow or not allow a Motion to Suppress Evidence during the trial or hearing.

The Georgia Court of Appeals' opinion in the present case set forth in the Appendix of Petitioner's Brief holds that the Trial Court has the discretion to allow a Motion To Suppress Evidence during the trial or hearing. In so holding, the Court of Appeals equates the language of the Georgia Search and Seizure Law of 1966 and Rule 41 (e) of the Federal Rule of Criminal Procedure. Moreover, the Court reaffirms the rule that the motion must be timely filed or it is waived citing *Brannen v. State,* 117 Ga. App. 69 S.E. 2d; *Gilmore v. State,* 117 Ga. App. 67, S.E. 2nd. This opinion, in effect, upholds the Trial Courts determination that the motion was not timely filed and the Trial Courts refusal to entertain the written Motion to Suppress.

In *Brannen v. State,* supra, the Georgia Court said, in part:

> "Since the Act of 1966, an oral objection to evidence obtained by unlawful search and seizure is not sufficient unless preceded by suppression of the evidence pursuant to a motion to suppress in compliance with the Act. The Act clearly evinces the legislative intent that suppression, or exclusion, of the evidence must be founded on motion, or objection, in writing." (Emphasis added)

As we have pointed out in the State's Statement, no written motion to suppress evidence was made prior to trial. Considerable testimony was given without objection as to objects taken from the scene of the slaying to the blood-stained condition of the bedroom. (See R-32 where the son identified the bent vacuum cleaner handle and R 52-53 where defense counsel cross-examined the son about the vacuum cleaner handle.) See also the testimony of Paul Serene, the expert witness from the State Crime Laboratory, who testified at length about all the State Exhibits taken from the bedroom, without a single objection by the defense. (R 83-90) and defense counsel's cross-examination of him about these same Exhibits (R 90-93).

All of the photographs were identified as accurately portraying the scenes depicted by Detective C. A. Bailey, (R 98-100) and he testified at length about the various items taken, identifying each by number, without a single objection by the defense (R 101-106). It was only after defense counsel elicited on cross-examination of Detective Bailey that he had no search warrant for Petitioner's house that the defense orally moved to suppress the evidence (R 109). A written motion to suppress was never filed until 2:25 o'clock on the second day of the trial and after the State had rested its case (R 160-161).

These facts clearly support the Trial Judge's decision. The transcript shows that the written Motion to Suppress Evidence was made after the State rested its case (R 160) and after the evidence objected to was introduced into evidence during the State's presentation of its case (R 117, 146, 147). The defense counsel stated he was unaware of a search without a warrant early in the second day of the trial but did not present any evidence or make any showing that he was not barred by laches from filing a Motion to Suppress at that late time (R 101, 111-116). Moreover, the defense counsel did not file a written Motion immediately after the noon meal hour recess (R 129) and did not file the written motion until after the State had rested its case at 2:25 P.M. in the afternoon (R 161).

In numerous Federal decisions, this Court has refused to grant certiorari in similar factual situations.

In *Garcia v. U.S.*, 315 F.2nd 133 (1) cert. denied 375 U.S. 855, 11 L.Ed. 2nd 82, 84 S.Ct. 117 (1963), the defendant did not move for suppression of evidence until nine months later during the course of the trial and after he had permitted the introduction of oral evidence upon the substance seized. The Fifth Circuit held that the right to suppression was waived in an absence of some showing of a reason for the delay. A similar factual case and verdict was rendered in *Rosen v. U.S.*, 293 F.2nd 938 (3) 5th Circuit (1961). As in those cases, there was no showing of any reason for the delay in the present case.

In *U.S. v. Shavin,* 320 F.2nd 308 7th Circuit (1963) cert. denied 375 U.S. 944, 11 L.Ed. 2nd 273, 84 S.Ct. 349, the Court upheld the trial court's decision deny-

ing a motion to suppress made after the trial proceeded into the fourth witness. In a similar 1968 Fifth Circuit case where the defense had an opportunity to know the facts prior to trial, the Court affirmed the trial court's decision. *Small v. U.S.,* 396 F.2nd 764 (3) In *Small,* the Court pointed out that the delay was part of counsel's trial stratagem and that counsel invited error when he did not object to several references to the exhibit. These circumstances apply to the present case where testimony was elicited from several witnesses without objection and again on cross-examination. (Respondent's Statement of Facts, supra)

As the previous cases citing U.S. Supreme Court and other Circuits of the U.S. Circuit Court of Appeals decisions indicate, there isn't any dispute between the Circuits upon this point. *U.S. v. Di Donato,* 301 F.2nd 383, cert. denied 370 U.S. 917, 82 S.Ct. 1557, 8 L.Ed. 2nd 497; *Belcher v. U.S.,* 50 F.2nd 573 8th Circuit (1931); *U.S. v. Romero,* 249 F.2nd 371 (1957).

B. IN GEORGIA THE DEFENDANT *ALWAYS* HAS THE OPPORTUNITY TO DETERMINE WHETHER A SEARCH WARRANT WAS ISSUED WITH PROBABLE CAUSE *PRIOR* TO TRIAL

The Federal Rules of Criminal Procedure 41 (8) expressly provides that the motion shall be made before trial or hearing unless opportunity therefore did not exist or the defendant was not aware of the grounds for the motion. However, the Georgia Legislature provided a means for a defendant to determine if a search warrant was issued by expressly requiring that a public record be made of all search warrants and their returns. Ga.

Code Ann. §27-304, 310. Moreover, the Search and Seizure Law adopted in Georgia required that the officer deliver a copy of the return to the person from whom the property was seized, upon request. Ga. Code Ann. §27-310.

Therefore under the Georgia Law of Search and Seizure, the defendant always has the opportunity to ascertain whether a search warrant was issued and probable cause set forth as a basis for the search warrant and what items were returned by the search prior to trial.

Hence, the Georgia Statute goes further than the comparable Federal Statute to provide ample opportunity for the defendant to ascertain whether a search warrant was issued and whether the search warrant was valid prior to trial. Even the Federal cases do not allow the late filing of a Motion to Suppress, if the defendant clearly had the opportunity to know whether a search warrant had been issued or not prior to trial. *Jones v. U.S.*, 362 U.S. 257 (1960)

This means that either the Petitioner, who had been free on bond for five months (indicted for Murder August 4, 1967 and granted bail the same day—R 7-8) or his attorney could have ascertained by simply examining the Search Warrant Docket of the trial court and the court file on this case that no search warrant had been issued and no inventory of property seized had been filed. Or they could have inquired of the District Attorney or of the officers themselves whether a search warrant had been issued. There is absolutely no showing whatever that Petitioner or his counsel ever made inquiry of any official connected with the prosecution about the circumstances of the search, or that they were either re-

fused information or misled by any such official. Thus there is a clear showing of laches on the part of Petitioner.

C. THE SEARCH WITHOUT A SEARCH WARRANT WAS NOT ILLEGAL AND UNREASONABLE UNDER THE EXIGENCIES OF THE SITUATION

The facts in the present case show emergency circumstances that required Atlanta Police Officers to search the Petitioner's home without a search warrant. Under those unusual circumstances, the reasonableness of the search is without question.

Under the facts of the present case, the police had sufficient reasons to suspect a violent crime or crimes had been committed within the curtilage of the house. The details of one killing and the details of the bloody bedroom had been related to police officers (R 136). A woman has been slain in the house where she lives, the police have been called to that home to investigate, the husband is under arrest for her homicide at the hospital, the house has been left unprotected, unlocked and with the front door open, and an officer has been requested by the 19 year old college student son who also lives in that house to return to the house to shield his brothers and his sister from the horror of a blood-drenched bedroom. The officers were aware only what had been told to them and did not know whether some other person within the house had placed the original call for police to come to the house, and if so, whether that person had been injured or killed (R 107). Moreover, the officers knew other persons had been summoned to the house where the instrumentality of the killing, presumably a

glass fruit jar, and blood covered the bedroom floor (R 158, 136). In fact, Petitioner's brother arrived while the police were at the house (R 103, 106).

This was an emergency situation in every aspect. This house was the scene of a crime of violence as distinguished from the usual search for contraband or fruits of a crime after its commission. In this connection, the United States Supreme Court said in the recent landmark decision of *Warden v. Hayden,* 387 U.S. 294 (1967), where a search of the basement and house of the defendant was upheld although not incident to an arrest, without a search warrant and without consent of the defendant:

> "We agree with the Court of Appeals that neither the entry without warrant to search for the robber nor the search for him without warrant was invalid. Under the circumstances of this case, 'the exigencies of the situation made that course imperative.' *McDonald v. United States,* 335 U.S. 451, 456." (Emphasis added)

The Supreme Court added that "The Fourth Amendment does not require police officers to delay in the course of an investigation if to do so would gravely endanger their lives or the lives of others." In this case, the U.S. Supreme Court held for the first time searches may be made for "mere evidence" of the commission of a crime.

We respectfully submit that the exigencies of the situation in this case required the officers to proceed immediately to the home of Petitioner, as they had been requested to do by his son, to determine the circumstances existing there. In addition, the burden of obtaining a search warrant was more than likely to frustrate

the government purpose behind the search. *U.S. v. Rabinowitz,* 330 U.S. 56, 65; *Schmerber v. California,* 384 U.S. 757, 853. In *Spiro v. McKendrick,* 2 Criminal Law Reporter 2023 (1967), New York District Court, the court citing *Rabinowitz, supra,* and *Cooper v. California,* 386 U.S. 58, 62, stated:

> "Spiro argues further, that, 'however the events are analyzed, there was ample time and opportunity for the police to have obtained a search warrant for the later search.' This is not a persuasive argument here. 'The relevant test is not whether it is reasonable to procure a search warrant, but whether the search was reasonable.' "

This case is analogous to *Warden v. Hayden,* 387 U.S. 294 (1967) in that the exigencies of the situation made the search imperative. Unlike, *James v. State of Louisiana,* 382 U.S. 37 cited by the Appellant involving the search of the house for narcotics in which there were no emergency circumstances, the present case clearly show exigencies that required the officers to act promptly.

In effect, the Petitioner argues that if an assailant manages to remove his victim far away enough from his house before police arrive the police would not have a right to search the home under any circumstances without a search warrant, citing *James v. Louisiana, supra.* Such is not the law as the relevant factor is the reasonableness of the search. *Cotton v. United States,* 371 F.2nd 385, 392. In the recent case of *Sibron v. New York,* 392 U.S. 40, decided June 10, 1968, this Court stated:

> "The question in this court upon review of a state-approved search or seizure is not whether the search was authorized by state law. The question is rather whether the search was reasonable under the Fourth Amendment."

In *Steven v. State,* 443 P.2d 600, decided July 23, 1968, the Alaska Supreme Court upheld a warrantless search of a frontier home after the discovery of the homicide under the "exigency rule". The police entered the home without a warrant upon receiving an emergency call, were told of the homicide, and then inspected the premises. The Court held that after legal entry, with knowledge that a homicide had been committed, it became duty of police officer to investigate the circumstances and that this duty carried with it the right to inspect the premises.

In *Davis v. State,* 236 Md. 389, 204 A.2d 76, cert. denied, *Davis v. Maryland,* 380 U.S. 966, 85 S.Ct. 1113, 14 L.Ed. 2d 156 (1965), the Maryland Supreme Court upheld the warrantless entry of the house. The police were called to investigate a body found in a yard, saw two feet at a window of the house but were unable to see more, saw blood stains on the porch, knocked without response, and entered the house to determine if the owner of the pair of feet was injured or dead. Similarly, Officers in the present case proceeded to the Thomas residence within minutes of receiving the emergency call because they didn't know whether someone else was injured at the home, who had called, or whether the call had been placed from the home and felt they had authority to enter the house because of the original police call to go to the house and because of the open front door and the fact that no one had responded at the house to Officer Anglin's calls (R 108).

As aptly pointed out in *Wayne v. U.S.,* 318 F.2d 205, 212, cert. denied 375 U.S. 860, 84 S.Ct. 125, 11 L.Ed.2d 86 (1963), "the business of policemen and firemen is to act, not to speculate or meditate on whether the report

is correct. People could well die in emergencies if police tried to act with the calm deliberation associated with the judicial process. . . . A myriad of circumstances could fall within the terms exigent circumstances referred to in *Miller v. U.S.*, 357 U.S. 301, 78 S.Ct. 1190, 2 L.Ed. 2d 1332 (1958)." See also, *U.S. v. Barone,* 330 F.2nd 543 2d Circuit, cert. denied 377 U.S. 1004, 84 S.Ct. 1940, 12 L.Ed. 2d 1053 (1964); *Patrick v. State,* 227 A.2d 486, 489 (Del. 1967); *Davis v. State, supra.* As pointed out by Justice Butler in *Go-Bart Importing Co. v. U.S.,* 282 U.S. 344, 357 (1931), "there is no formula for the determination of reasonableness. Each case is to be decided on its own facts and circumstances." *U.S. v. Rabinowitz,* 339 U.S. 56, 63 (1950); *Rios v. U.S.* 364 U.S. 253, 255 (1960); *Ker v. California,* 374 U.S. 23 at 33, 83 S.Ct. 1623, 10 L.Ed.2d 726 at 744.

Moreover, Officers have a duty to safeguard the property of citizens, even suspects, which is abandoned or unprotected. See *Cotton v. United States,* 9 Cir. 1967, 371 F2 385, where the Ninth Circuit Court of Appeals said in part, at page 392:

> "Cotton having been validly arrested and taken to the police station, the officer would have been derelict in his duty if he had left the car unattended in a dark alley in the middle of the night. The police have as much a duty to protect the property of a suspect as they have to protect the property of the rest of us, and that is what they did in this case by towing the car to the police impound. They also had a duty to keep a record of the property that they had impounded so that it could be returned to the suspect or to its owner in due course. For reasons stated below, we do not think that the mere opening of the door of the car for the purpose of making such a record was, under the circum-

> stances, a search, but if it was, the circumstances under which it was done make that search an entirely reasonable one. . . . The Constitution prohibits only unreasonable searches and seizures." (Emphasis added)

Certainly, by analogy, the Atlanta Police Officers had a clear duty to enter the Petitioner's home to secure it against instrusion by others and to determine the circumstances existing within that home, to which they had been initially summoned only minutes earlier and where violent death had struck.

CONCLUSION

In summary, we respectfully insist that this Petition is completely without merit for two reasons, (1) the Petitioner completely waived any right to complain about the search and seizure through his failure to file a timely written motion to suppress until the State rested and (2) in any event, the search and seizure of evidence in his home was completely lawful and reasonable under the peculiar circumstances and exigencies of this case.

For the foregoing reasons, Respondent urges that this Court deny the Petition For Certiorari in this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I am a member of the Bar of the Supreme Court of the United States in good standing, and that I have this day deposited in the United States Post Office, Atlanta, Georgia, three copies of the foregoing Brief of Respondent in Opposition to Petition for Writ of Certiorari with first class postage prepaid, addressed to Mr. Frank B. Hester, Hester & Hester, 803 Fulton Federal Bldg., Atlanta, Georgia 30303, counsel of record for Petitioner.

This.....day of....., 1969.

J. ROBERT SPARKS
Of Counsel for Respondent